78-150
No.

FILED
JUL 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

COLIN M. GONZALES, et al.,

Petitioners,

v.

FAIRFAX-BREWSTER SCHOOL, INC., et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

COLIN M. GONZALES, *et al.*,

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v.

FAIRFAX-BREWSTER SCHOOL, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

[1] Petitioners, plaintiffs below, consist of Colin M. Gonzales and Michael C. McCrary, infants, who brought this action through their respective parents, as well as their parents, Raymond Gonzales and Margaret R. Gonzales, and Curtis L. McCrary and Sandra McCrary. Respondents consist of defendants Fairfax-Brewster School, Inc., Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, and defendant-intervenor Southern Independent School Association.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-6a) is reported at 569 F.2d 1294. The relevant order of the district court (App. D, *infra*, pp. 10a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 7a-8a) was entered on January 20, 1978. Petitioners filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the court of appeals by its order entered March 29, 1978 (App. C, *infra*, p. 9a). On June 20, 1978, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including July 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), which Congress directed to be applied to cases pending at the time of its enactment, is applicable to the instant case, which, at the time the statute was enacted, had been remanded from this Court and was pending in the district court awaiting the resolution of issues concerning taxation of costs.

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) provides as follows:

> § 1988. **Proceedings in vindication of civil rights** . . . In any action or proceeding to enforce a provision of §§ 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 *et seq.*], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 U.S.C. §§*1 et seq.*], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [As amended Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.]

STATEMENT

Because this case was pending in the district court when the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) became effective, plaintiffs moved for an award of attorneys' fees pursuant to the congressional direction that the new statute be applied to all cases pending on the date of its enactment. Contrary to the congressional instruction and to controlling authorities, the district court, with the court of appeals affirmance, denied plaintiffs' motion for attorneys' fees.

This is the latest and final stage of an historic civil rights case in which this Court held on June 25, 1976, that private schools are prohibited by the Civil Rights Act of 1866 (42 U.S.C. § 1981) from denying admission to individuals on the basis of race. *Runyon v. McCrary*, 427 U.S. 160. This proceeding originated with the filing of

two complaints in the district court on December 19, 1972. The cases were consolidated for trial and on July 27, 1973, the district court issued its decision holding that the defendant schools violated 42 U.S.C. §1981 by denying admission to Colin M. Gonzales and Michael C. McCrary because they are black. 363 F. Supp. 1200. The court ordered appropriate injunctive relief and awarded compensatory damages. The district court also awarded plaintiffs their costs, as well as attorneys' fees in the amount of $1,000 against each of the defendant schools (*infra*, p. 2a).

On appeal, the court of appeals affirmed the district court's injunctive order and award of damages. 515 F.2d 1082. However, the court of appeals reversed the district court's award of attorneys' fees, holding that in the absence of any statutory authorization such award was inappropriate under the "private attorney general" doctrine, and that the facts did not warrant an award on the theory that the defendants had displayed bad faith or obdurate obstinancy (*infra*, p. 3a).

Upon the petitions of defendants and the defendant-intervenor, this Court granted certiorari and affirmed the holding of the court of appeals that the defendant schools had violated 42 U.S.C. §1981 by their racially discriminatory admission policies. In addition, this Court granted plaintiffs' cross-petition for certiorari on the issue of attorneys' fees, but rejected plaintiffs' contention that they should be awarded such fees under the bad faith exception to the established American rule. This Court's judgment was issued on August 11, 1976, and provided, among other things, that the costs of printing the record should be shared equally by the parties and therefore that defendants should recover from plaintiffs specific amounts

stated in the judgment. The Court's judgment was mailed to the clerk of the court of appeals who in turn forwarded it to the clerk's office of the district court where it was received on August 16, 1976 (*infra*, p. 3a).

The Civil Rights Attorney's Fees Awards Act of 1976 was signed into law by President Ford on October 19, 1976. Since its legislative history as well as controlling case law indicate that the statute was to be applied to cases pending at the time the statute became effective, plaintiffs, on November 1, 1976, filed a motion in the district court for an award of costs, including attorneys' fees. Plaintiffs' motion noted that the district court had not acted on their request for taxation of costs in that court under 28 U.S.C. §1920.[2] In their motion, plaintiffs further noted that the costs of printing the record in this Court awarded under this Court's judgment of August 11, 1976, had not been taxed by the clerk of the district court as part of that court's final judgment. The motion requested that the district court enter an order settling costs and awarding attorneys' fees as provided in the 1976 statute. While plaintiffs' motion was pending in the district court, the defendants each filed motions in the court of appeals requesting that it order plaintiffs to reimburse them for a proportionate share of the cost of printing the appendix used on the appeal in that court (*infra*, p. 4a, n.4).[3]

[2] In their bills of costs filed in the district court on April 25, 1975, plaintiffs had claimed $153.09 from Fairfax-Brewster School and $162.37 from Bobbe's Private School. These amounts included fees for filing and service of the complaint, the cost of deposition transcripts used at trial, and the trial transcript used on appeal.

[3] The court of appeals had entered its judgment on the merits of the appeals nearly two years earlier, on April 15, 1975.

On December 14, 1976, the district court denied plaintiffs' motion for costs, thus reversing its 1973 decision awarding costs to plaintiffs. In addition, the court denied plaintiffs' motion for an award of attorneys' fees pursuant to the Attorney's Fees Awards Act of 1976. The district court further ordered that the cost of printing the record awarded to defendants by this Court should be paid by plaintiffs as specified in this Court's judgment. Finally, the district court noted that its order did not constitute a ruling concerning defendants' motions then pending in the court of appeals seeking to compel plaintiffs to share the cost of printing the appendix used on appeal (*infra*, pp. 10a-11a).

On January 24, 1977, the court of appeals granted defendants' two motions and ordered plaintiffs to pay a proportionate share of the cost of printing the appellate appendix (*infra*, p. 4a, n.4).

On plaintiffs' appeal from the district court's order, denying their motion for costs including attorneys' fees, the court of appeals, on January 20, 1978, issued its decision affirming the district court's denial to plaintiffs of an award of attorneys' fees. While not disputing that the case was pending in the district court at the time of enactment of the Attorney's Fees Awards Act of 1976, the court nevertheless held the statute was not applicable to the case for two reasons. First, distinguishing *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), which, like this case, involved the applicability of a newly-enacted attorneys' fee statute to a pending proceeding, the court of appeals noted that in that case the new law became effective while the case was pending on appeal, whereas here the new law did not become effective until two months after this Court's judgment had been

filed in the district court. The court thus construed *Bradley* as holding, not that a new law such as the Awards Act of 1976 is applicable to all cases pending at the time of the law's enactment, but that it is applicable only to cases pending on appeal. As the second ground for its decision, the court of appeals held that since this Court's judgment, which had been issued over two months before enactment of the statute, contained no authorization for an award of attorneys' fees, the district court was without authority to reopen the case to consider that issue (*infra*, pp. 4a-6a).

As a final matter, the court of appeals reversed the district court's ruling that each party should bear its own costs. The court of appeals held that after the district court awarded costs to plaintiffs in its order of July 27, 1973, that award became a finality, and the district court had no authority to alter it in carrying out the mandate of this Court. The court of appeals therefore remanded the proceeding to the district court to reinstate the taxation of costs under 28 U.S.C § 1920 in favor of plaintiffs (*infra*, p. 6a).[4]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case should be reversed because it is directly contrary to the explicit con-

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[4] On remand, the district court, on June 13, 1978, entered orders taxing costs of $100.32 against Fairfax-Brewster School and $103.32 against Bobbe's School. The costs of deposition transcripts used at trial claimed against the two schools in the amounts of $42.77 and $59.25, respectively, were disallowed.

gressional direction that the Civil Rights Attorney's Fees Awards Act of 1976 be applied to all cases pending on the date of its enactment. In addition, the court's holding is in irreconcilable conflict with controlling decisions of this Court.

The 1976 Act specifically entitles the prevailing party in a case brought under 42 U.S.C. §1981, the statute involved here, to recover "an award of attorney's fees as an item of costs." *Hutto v. Finney*, ___ U.S. _____, 46 U.S.L.W. 4822 (decided June 23, 1978). There can be no doubt here that the matter of costs remained unresolved and that the case therefore was still pending in the district court on October 19, 1976, when the new Act became effective. Nor was the cost issue immediately resolved by the district court, for its order of December 14, 1976, denying costs to plaintiffs was held to be reversible error by the court of appeals, which remanded the case to the district court for taxation of costs in favor of plaintiffs. Further, the court of appeals itself, in an action signifying the continuing pendency of the case, on January 24, 1977, granted defendants' motions for reimbursement of the cost of printing the appendix used on appeal.

As this Court stated in *Hutto v. Finney, supra*, the Civil Rights Attorney's Fees Awards Act of 1976 "could not be broader. It applies to 'any' action brought to enforce certain civil rights laws." ___ U.S. ___, 46 U.S.L.W. at 4821. It is clear beyond peradventure that among the actions that Congress intended to be covered by the Act are those that were pending on its effective date. This case obviously was pending on October 19, 1976, and indeeed, the court of appeals did not hold otherwise. Hence, there is no justification for the court's

disregarding the explicit congressional instruction, contained in the legislative history of the Act, that it be applied to a case such as this. When the statute was under consideration by the House of Representatives, an amendment was offered by Representative Ashbrook designed to "exempt from the coverage of this act all of those hundreds of cases which are pending right now." (122 Cong. Rec. H 12166, 94th Cong. 2nd Sess. (1976, daily ed.)). The amendment stated:

> The provisions of this act shall take effect upon enactment and shall be applicable to cases filed only after the effective date of this act.

The Ashbrook amendment was decisively defeated by a vote of 268 to 104 (*ibid.*) Similarly, elsewhere in the legislative history there is abundant evidence of the unmistakable congressional intent to apply the statute to all cases pending on its effective date. See, *e.g.*, statements of Senator Abourezk, the Senate manager of the bill (122 Cong. Rec., *supra*, at S 17052) and Representative Drinan, the House manager (122 Cong. Rec., *supra*, at H 12160); H. R. Report No. 94-1558, 94th Cong., 2d Sess. p. 4, n.6 (1976); and remarks of Representative Anderson of Illinois (122 Cong. Rec., *supra*, at H 12155).

In holding that an attorneys' fee statute similar to the one herein was applicable to a pending case, this Court stated in *Bradley v. School Board of the City of Richmond, supra*, that it was anchoring its decision on the long-established principle that (416 U.S. at 711):

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice

or there is statutory direction or legislative history to the contrary.

With respect to the Civil Rights Attorney's Fee Awards Act of 1976, the legislative history is crystal clear – Congress indicated its unmistakable intention that the statute was to be applied to all cases pending on its effective date.

The court of appeals, however, completely misreads *Bradley* as holding that the principle followed there is only applicable to cases pending on appeal at the time a new law becomes effective. Not only is there a total lack of evidence in the legislative history of the 1976 Act to indicate that Congress intended the statute to be applied to such a limited classs of pending cases, but the court of appeals' decision totally distorts the principle of judicial decision-making upon which the *Bradley* decision is grounded. For it is obvious that if a court of appeals is obligated to apply a new law to a case pending before it, *a fortiori*, a district court is under the same obligation. This is demonstrated beyond question by the decisions of this and other courts. *E.g. Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *Sampeyreac v. United States*, 7 Pet. 222, 239-240 (1833); *Ziffrin v. United States*, 318 U.S. 73, 78 (1943). See also *Perez v. Rodriguez Bou*, 575 F.2d 21, 24 (C.A. 1, 1978); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 99-100 (C.A. 2, 1977); *Simpson v. Weeks*, 570 F.2d 240, 241, 244 (C.A. 8, 1978); *Keyes v. School District No. 1, Denver, Colo.*, 439 F.Supp. 393, 401 (D. Colo., 1977).

The second basis for the court of appeals' decision – that the district court lacked authority on remand to grant an award of attorneys' fees pursuant to the 1976

Act because this Court's mandate did not provide for such an award – is completely contrary to controlling decisions of this Court. In two cases (*Sprague v. Ticonic National Bank*, 307 U.S. 161 (1938); and *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970)) this Court has decided virtually the identical issue that is involved here. The court of appeals' refusal to follow those compelling precedents is inexplicable. In both of the cited cases, it had been held below that the district courts lacked authority, following proceedings in this Court, to grant attorneys' fee awards, and in both cases, this Court reversed and ruled to the contrary.

In the *Sprague* case, the plaintiff successfully established the right of herself and others to recover earmarked funds held in trust by an insolvent bank, and following this Court's affirmance (*Ticonic National Bank v. Sprague*, 303 U.S. 406 (1938)), plaintiff petitioned the district court for an award of attorneys' fees. The district court held, with the court of appeals' affirmance, that it had no authority to grant the petition because such an award had not been provided for in its original judgment and there was no provision for an award in this Court's mandate. In reversing, this Court stated that while its mandate "is controlling as to the matters within its compass," matters not covered by the mandate could properly be considered by the district court. 307 U.S. at 168. Since the equitable claim for attorneys' fees was based on considerations that could not be evaluated until the litigation, including the final appeal, was concluded, this Court held that the issue was sufficiently different from matters covered by the district court's original judgment and the appellate mandates that the district court was not foreclosed from considering the fee claim on its merits. Similarly here, since the Awards Act of 1976 did not become effective until after this

Court's judgment was entered, the issue of a statutory fee award was not considered by this Court and the matter therefore fell outside the Court's mandate.

To the same effect is *Perkins v. Standard Oil Co., supra,* where, following the plaintiff's success in this Court in a private antitrust action, he applied to the district court for a statutory award of attorneys' fees for legal services performed in the appellate stages of the litigation. The district court had awarded fees for services performed when the proceeding was originally before it, but denied the application for appellate fees and the court of appeals affirmed on the ground that such an award was not authorized by this Court's mandate. In a *per curiam* decision this Court reversed, holding that since the matter was outside the scope of its mandate, the attorney fee application was open for consideration by the district court. The Court noted that the appropriate time for determining the amount of an attorneys' fee award is at the conclusion of the appellate stages of the litigation, and that such a determination should be made in the first instance by the district court on the basis of evidence as to the extent and nature of the services rendered. 399 U.S. at 223.[5]

Though it is true, as the court of appeals herein noted, that plaintiffs unsuccessfully argued in this Court that they should receive an attorneys' fee award under the bad faith exception to the established American rule, the subsequent enactment by Congress of the Civil Rights Attorney's Fees

[5] In *Maddrix v. Dize,* 153 F.2d 274 (1946), the Fourth Circuit, in a decision totally at odds with its holding herein, applied the principle enunciated in the *Sprague* and *Perkins* cases to hold that this Court's mandate following its decision on the merits of a case does not preclude the district court's consideration of a subsequent application for an attorneys' fee award.

Awards Act of 1976 created an entirely new basis for such an award. Therefore, this Court's rejection of plaintiffs' bad faith contention did not preclude the district court's consideration of their motion for a statutory award of fees, because that matter was outside the scope of this Court's mandate. But even if one were to construe this Court's decision as a broader holding that plaintiffs were not entitled to attorneys' fees under any theory and to regard the mandate as having a correspondingly broad scope, that still would not preclude the application of the Awards Act of 1976 to this case. For the district court in such circumstances would be obligated to apply the Act to this case, because "the rule of law expressed by the mandate had been affected by a subsequently enacted federal statute." *Banco Nacional de Cuba v. Farr,* 383 F.2d 166, 178 (C.A. 2, 1967), cert. denied, 390 U.S. 956. As the Second Circuit held in the cited case, if a conflict arises in the course of litigation between the law of the case and a newly adopted act of Congress, a court is duty-bound to respect the latter. This obviously follows from the principle that a court must apply the law in effect at the time it renders its decision. *Bradley v. School Board of the City of Richmond, supra.*[6]

[6] Defendants argued in the court of appeals that it would be a "manifest injustice" to assess attorneys' fees against them because they are private schools with limited funds. The sources and extent of defendants' resources are not shown by the record but those resources have been adequate to enable defendants to conduct this litigation from the time the complaint was filed and to carry their appeals through successive stages without once abandoning their original contention that they were entitled to operate their schools on a racially discriminatory basis. An award of attorneys' fees was requested in the complaint and the propriety of such an award was litigated at every stage. Although defendants received favorable

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

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judicial rulings with respect to the attorneys' fee issue under the theories then being advanced, the enactment of the Awards Act of 1976 merely served "to create an additional basis or source for [defendants'] potential obligation to pay attorney's fees. It does not impose an additional or unforseeable obligation upon [them]." *Bradley v. School Board of the City of Richmond, supra,* 416 U.S. at 721. Further, it should be noted that plaintiffs' claim for attorneys' fees is also against the intervening organization, Southern Independent School Association, which, the record shows, has nearly 400 schools affiliated with it and has been an active participant in the litigation. Although it has been alleged that the association is dissolved, under the applicable provisions of the Georgia corporation statute, plaintiffs' claims for attorneys' fees, having been timely filed, would survive the dissolution. Ga. Code Ann. §22-3119.

APPENDIX A

Colin M. GONZALES, infant by his parents, Raymond Gonzales and Margaret R. Gonzales, and Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary, Appellants,

v.

FAIRFAX-BREWSTER SCHOOL, INC., Russell L. Runyon, Katheryne E. Runyon and Southern Independent School Association, Appellees.

No. 77-1278 1

United States Court of Appeals,
Fourth Circuit.

Argued Nov. 8, 1977.
Decided Jan. 20, 1978.

Roderic V.O. Boggs, Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C. (Allison W. Brown, Jr., Washington, D.C., Robert M. Alexander, Arlington, Va., on brief), for appellants.

Andrew A. Lipscomb, Bethesda, Md., for appellee Fairfax-Brewster School, Inc.

Louis Koutoulakos, Arlington, Va., for appellees Russell L. Runyon, Katheryne E. Runyon, d/b/a Bobbe's Private School.

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and FIELD, Senior Circuit Judge.

FIELD, Senior Circuit Judge:

This is the epilogue to *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), in which the Supreme Court held that private schools are prohibited by the Civil Rights Act of 1866, 42 U.S.C. § 1981, from denying admission to individuals on the basis of race. When the case returned to the district court pursuant to the Supreme Court's judgment, counsel for the plaintiffs filed a motion seeking an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended, 90 Stat. 2641.[1] The motion was denied by the district court and this appeal followed.

A brief history of this litigation is essential to the disposition of this appeal. The proceedings originated with the filing of two complaints in the district court on December 19, 1972. The cases were consolidated and on July 27, 1973, the district court issued its decision in which it ruled in favor of the plaintiffs in both cases. The court ordered appropriate injunctive relief and awarded compensatory damages. The district court also held that the plaintiffs were entitled to attorneys' fees in the amount of $1,000.00 against each of the defendant schools.

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[1] The amendatory language is as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Upon appeal to this court, the case was heard en banc and the majority of the court affirmed the district court's injunctive order and award of damages.[2] However, we reversed the district court's award of attorneys' fees, holding that in the absence of any statutory authorization such an award was inappropriate under the "private attorney general" doctrine, and that the facts did not warrant an award on the theory that the defendants had displayed bad faith or obdurate obstinacy.

Upon the petitions of the defendants, as well as the intervenor, the Supreme Court granted certiorari and affirmed the decision of this court upon the principal issues in the case. In addition, the Court granted the plaintiffs' cross-petition for certiorari on the issue of attorneys' fees, but rejected the plaintiffs' contention that they should be awarded such fees under the bad faith exception to the established American rule. The judgment of the Supreme Court was issued on August 11, 1976, and provided, among other things, that the costs of printing the record should be shared equally by the four parties who had sought review in that Court. The judgment was mailed to the Clerk of our court who in turn forwarded it to the clerk's office of the district court where it was received on August 16, 1976.

The Civil Rights Attorney's Fees Awards Act of 1976 was signed into law on October 19, 1976, and on November 1, 1976, the plaintiffs filed their motion in the district court for an award of costs and attorneys' fees. Their motion noted that the district court had not acted upon the

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[2] Reported *sub nom. McCrary v. Runyon*, 515 F.2d 1082 (4 Cir. 1975).

plaintiffs' request for costs in that court[3] under 28 U.S.C. § 1920, and that the costs awarded to the defendants under the order of the Supreme Court had not been taxed by the Clerk of the district court as part of that court's final judgment. The motion requested that the district court enter an order settling the costs and awarding attorneys' fees in the amount of $53,475.00 as part of the costs as provided in the 1976 amendment. The district court denied the request for attorneys' fees and ruled that each party should bear its own costs in that court. The order also provided that the costs assessed against the plaintiffs by the Supreme Court should be paid to the defendants as specified in that Court's judgment.[4]

[1] The plaintiffs rely primarily upon *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), as well as our decision in *Alphin v. Henson*, 552 F.2d 1033 (4 Cir., 1977). However, in our opinion neither of those cases supports the plaintiffs' position. The issue in *Bradley* was stated by the Court as follows:

> "The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law." 416 U.S. at 710, 94 S.Ct. at 2015.

[3] The amount of costs claimed by the plaintiffs was $153.09 from Fairfax-Brewster School, Inc., and $162.37 against Bobbe's School.

[4] While the plaintiffs' motion was pending in the district court, the defendants filed motions in this court requesting that we require the plaintiffs to reimburse each defendant for an appropriate share of the cost of printing the appendix. The order of the district court expressly stated that it declined to rule on this aspect of the case. By order entered in this court on January 24, 1977, we directed that costs for the preparation of the appendix should be shared proportionately by the parties based upon the respective materials submitted.

The award of fees in that case was based upon the well recognized "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711, 94 S.Ct. at 2016. Unlike *Bradley*, in the present case the amendment was not enacted while the appeal was pending, but was signed into law over two months after the judgment of the Supreme Court had been filed in the district court. In the light of this chronology, it is clear that the plaintiffs are not entitled to the benefit of *Bradley's* rationale.

[2] Similarly, our decision in *Alphin* is inapposite. In that case the plaintiffs' claim to attorney's fees was the sole subject of the appeal. Our initial decision was adverse to the plaintiffs, and on June 25, 1976, we stayed our mandate to permit them to petition for certiorari. The petition for certiorari was filed in the Supreme Court on August 16, 1976, and on September 30, 1976, the statute authorizing the award of such fees was enacted. Certiorari was denied on November 15,1976, and two days thereafter a petition for rehearing based upon the newly enacted statute was filed with us. We granted a further stay of our mandate to consider the plaintiffs' claim. Noting that "[o]ur control over a judgment of our court continues until our mandate has issued," 552 F.2d at 1035, we concluded that our decision in that case had not become a finality and that, accordingly, it was appropriate to amend our previous decision to bring

it into conformity with the newly enacted statute. As heretofore noted, in the present case the judgment of the Supreme Court had been filed with the Clerk of the district court on August 16, 1976, over two months prior to the effective date of the Fees Awards Act of 1976. Further jurisdiction of the district court was dependent upon the terms of the appellate mandate, and the court had no authority to reopen the case for the consideration of attorneys' fees or to conduct any proceedings except those specifically authorized by the appellate judgment. *See DuBuit v. Harwell Enterprises, Inc.*, 540 F.2d 690, 693 (4 Cir. 1976).

[3] While we affirm the denial of attorneys' fees, we think the district court acted improperly in directing that each party should bear its own costs in that court. In its order of July 27, 1973, the court had awarded such costs to the plaintiffs, and none of the parties had appealed from that aspect of the initial judgment order. Since the award of such costs had become a finality, the district court had no authority to alter it in any way in carrying out the judgment of the Supreme Court of the United States. Accordingly, we reverse the action of the district court in this respect and remand the case with directions to reinstate the taxation of costs under 28 U.S.C. § 1920 against the defendants.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

JUDGMENT

United States Court of Appeals
For the Fourth Circuit

No. 77-1278

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales, and Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary,

Appellants,

vs.

Fairfax-Brewster School, Inc., Russell L. Runyon, Katheryne E. Runyon and Southern Independent School Association,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part; reversed in part; and the case remanded to the United States District Court for the Eastern

District of Virginia, at Alexandria, with directions consistent with the opinion of this Court filed herewith.

/s/ William K. Slate II
Clerk

[Filed Jan. 30, 1978]
U.S. Court of Appeals
Fourth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1278

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales, and Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary,

Appellants,

versus

Fairfax-Brewster School, Inc., Russell L. Runyon, Katheryne E. Runyon and Southern Independent School Association,

Appellees.

[Filed Mar. 29, 1978]
William K. Slate, II
Clerk

ORDER

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Field for a panel consisting of Judge Haynsworth, Judge Winter and Judge Field.

FOR THE COURT:

/s/ William K. Slate, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk

By /s/ Emily Rueger

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, et al. Plaintiffs,	)	
V.	)	CIVIL ACTION NO. 494-72-A
FARIFAX-BREWSTER SCHOOL INC., Defendant.	)	
MICHAEL C. McCRARY, et al., Plaintiffs,	)	
V.	)	CIVIL ACTION NO. 495-72-A
RUSSELL L. RUNYON, et al., Defendants.	)	

ORDER

This matter came on to be heard on December 10, 1976, on the plaintiffs' request for taxing of costs, including attorneys' fees, and after hearing argument thereon it is

ORDERED that the plaintiffs' motion for attorneys' fees be denied, and each party shall bear its own costs in this Court, in the Court of Appeals and in the Supreme Court, except that the costs assessed against the plaintiffs in the Supreme Court in the amount of $516.66 shall be deducted by the defendants from the judgment in favor of plaintiffs when that judgment is paid, and this Court expressly does not rule on the question of the payment of cost for the Appendix before the Fourth Circuit Court of Appeals, the question as to who should pay that cost being now before that Court.

/s/ A. V. B. Jr.
United States District Judge

Alexandria, Virginia
December 14, 1976

Supreme Court, U. S.
FILED
SEP 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-150

COLIN M. GONZALES, ET AL.,
Petitioners,

v.

FAIRFAX-BREWSTER SCHOOL, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC. and RESPONDENTS RUSSELL L. RUNYON AND KATHERYNE E. RUNYON, D/B/A BOBBE'S PRIVATE SCHOOL, IN OPPOSITION

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September, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-150

COLIN M. GONZALES, ET AL.,
Petitioners,

v.

FAIRFAX-BREWSTER SCHOOL, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC. and RESPONDENTS RUSSELL L. RUNYON AND KATHERYNE E. RUNYON, D/B/A BOBBE'S PRIVATE SCHOOL, IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Respondent Fairfax-Brewster School, Inc., and respondents Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, pray that the Petition for Writ of Certiorari be denied.

JURISDICTION

Petitioners' statement as to this Court's jurisdiction to hear the Petition is accepted. These respond-

ents contend, however, that the case does not fall within the guidelines set forth in Rule 19, Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Petitioners' statement of question presented is not acceptable in the form in which set forth because it is argumentative, incomplete, and inaccurate. These respondents would restate the question presented as follows:

Whether the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), which became effective on October 19, 1976, applies to and has the effect of reversing this Court's express and final disposition of the issue of attorney's fees in a case decided by his Court on June 25, 1976, its mandate affirming the judgment below and awarding costs having been issued on August 11, 1976, filed with the Court of Appeals on August 13, 1976, and filed in the District Court on August 16, 1976.

STATEMENT

This Statement is limited to what these respondents deem necessary to correct inaccuracies and omissions in petitioners' Statement.

On June 25, 1976, the Court in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), held that in their action brought under 42 U.S.C. Section 1981 the petitioners here (who had cross-petitioned there on the attorneys fees issue and one other issue) were not entitled to the award of attorneys fees, the Court following its holding in *Alyeska Pipeline Service Corp.* v. *Wilderness Society,* 421 U.S. 240 (1975). The Court's mandate, affirming the judgment below and awarding costs, was issued on

August 11, 1976, filed with the Court of Appeals on August 13, and filed in the District Court on August 16. Two months later the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. Section 1988), (the Fees Awards Act), became law. The Fees Awards Act contains no language indicating that it is to be applied retrospectively or to "pending" cases, nor does it contain any definitions. However, the legislative history, including the House Committee report and statements of supporters of the legislation during debate in both houses show that it was intended to apply to cases pending on the date of its enactment in accordance with the principles explicated in *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974).

Ten days after the President signed the legislation petitioners filed their motion for costs, and for attorney's fees in the amount of $43,475.00, in the District Court. That court denied the claim for attorney's fees, stating that the case was substantively final, having been concluded by the United States Supreme Court before the effective date of the Act, and therefore the Act did not apply. The Court of Appeals affirmed the District Court's denial of the claim for attorney's fees. Both courts below acted in accordance with the controlling authorities.

The Court of Appeals, in affirming the District Court's denial of the motion for attorney's fees, correctly distinguished the case chiefly relied upon by petioners—*Bradley*—in which the statutory amendment had become effective while an appeal was awaiting decision in the appellate court, from the instant case, in which the statutory amendment became effective more than two months after this Court's judgment affirming the decision of the court below had been filed in the

District Court. In so doing the Court of Appeals did not, as asserted in petitioners' Statement, construe *Bradley* as holding that a new law such as the Fees Awards Act is applicable only to cases pending on appeal at the time of enactment, as is clear from the following language in its opinion:

> "The award of fees in that case was based upon the well-recognized 'principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" (quoting from *Bradley*) (Pet. App. 5a)

ARGUMENT

I

The Decision Below That the Civil Rights Attorney's Fees Awards Act of 1976 Is Inapplicable to This Case Is Clearly Correct

The Court of Appeals' resolution of the question involved here is fully in accord with and compelled by prior decisions of this Court, and especially and most recently the decision of this Court in *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1976). Since further review would not call for the exposition of any principles not already established, without any conflict of decisions, further review is unnecessary.

It is clear from the legislative history of the Fees Awards Act that Congress intended it to apply to cases still pending in the *Bradley* sense, irrespective of when they had been commenced, that is, to cases commenced before the date of enactment which had not been fully decided, or in which the issue of attorneys' fees had not been finally disposed of, before the date of enactment. The decisive and limiting role played by *Bradley* in committee and on the floor in both houses of Congress is indisputable, and this is especially true on the question of what is a pending case to which the Act may be applied.

The House Report declared: "In accordance with the applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696 (1974)." HR Rep. No. 94-1558, p 4 n 6 (1976). During debate in the Senate, Senator Abourezk, acting floor manager for the bill, said:

> "The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts. The application of this Act to pending cases is in conformity with the unanimous decision of the Supreme Court in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).
>
> "This application is necessary to fill the gap created by the Alyeska decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." (122 Cong. Rec. S. 17052, 94th Cong. 2nd Sess. (1976, daily ed.)).

During debate in the House, the following colloquy occurred between Congressmen Beard of Tennessee and Anderson of Illinois, both supporters of the bill:

> "Mr. Beard of Tennessee. . . . Is there any retroactive nature of this piece of legislation so far as cases that have been filed in the last several months?
>
> Mr. Anderson of Illinois. . . . it would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would

> depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent, it is retroactive. Pending cases could receive an award of reasonable fees." (122 Cong. Rec. H. 12155, 94th Cong. 2nd Sess. (1976, daily ed.)).

On this same point, Congressman Drinan, who was the member of the Committee on the Judiciary who submitted its Report, and floor manager for the bill, said:

> "I should add also that, as the gentleman from Illinois (Mr. Anderson) observed during consideration of the resolution on S. 2278, this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board the Supreme Court expressly applied that long-standing rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute." (122 Cong. Rec. H. 12160, 94th Cong. 2nd Sess. (1976, daily ed.)).

The precise question involved in *Bradley* was one relating to the applicability of an attorneys fee statute to a situation where the propriety of a fee award "was pending resolution on appeal when the statute became law." 416 U.S. at 710. In *Bradley* the question of the propriety of a fee award was in fact pending resolution on appeal in the Court of Appeals for the Fourth Circuit when the statute involved there became law. The contrary is true as to the instant case, where the question of the propriety of a fee award had been considered and resolved in the negative by this Court in *Runyon* v. *McCrary,* 427 U.S. 160, long before the statute involved here became law. The issue of attorneys' fees in *Runyon* was a dead issue when the Fees Awards Act

became law. This Court had decided that issue along with the other issues before it, the time for filing a petition for rehearing had passed, the Court had issued its mandate, and the mandate had been filed in the District Court, all before the Fee Awards Act became law. And it is clear from the opinion in *Bradley* and cases cited in *Bradley* that a finally decided case and issue are not affected by an after-enacted statute. This would be true whether the case had been decided in the district court and the time for appeal had passed, or in the court of appeals and the time for appeal or for filing a petition for certiorari had passed, or in this Court and the time for filing a petition for rehearing had passed. In the instant case there was a final judgment, as in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), which was cited in *Bradley.* These respondents had vested rights of non-liability for petitioners' attorneys' fees as a result of the final decision and judgment in their favor on the issue of attorneys' fees in *Runyon,* not subject to being divested by the after-enacted statute, *McCullough* v. *Commonwealth of Virginia,* 172 U.S. 102, 123 (1898); *Hodges* v. *Snyder,* 261 U.S. 600, 603 (1923). Neither the issue of attorneys' fees nor the merits of the case generally were open for further decision or revision by the District Court after this Court's judgment had been received and filed, the statute not yet having been enacted. Indeed, there was no case or controversy still pending at that stage of the proceedings, and the District Court was without jurisdiction to do any more than execute the mandate as received. *Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948); *Center for National Policy Review on Race and Urban Issues* v. *Richardson,* 534 F.2d 351 (D.C. Cir. 1976); *In re Long Island Lighting Company,* 244 F.2d 690 (C.A. 4 1976); *Skouras Theatres Corp.* v. *Radio-Keith-Or-*

pheum Corp., 193 F. Supp. 401, 404 (D.C.S.D.N.Y. 1961). See also *Bradley* v. *School Board of the City of Richmond, supra,* n 16 at 712, where it is noted that in *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L Ed 49 (1801), the French vessel involved had not been "definitively condemned" by the court below because an appeal from that decision was pending when a treaty with France was signed providing for the return of captured property "not yet definitively condemned," and note 19 in *Bradley, supra,* at 715, where it is stated that in *Thorpe* v. *Housing Authority of the City of Durham,* 386 U.S. 670, 673 (1966), the Court noted, "While the directive provides that certain records shall be kept commencing with the date of its issuance, there is no suggestion that the basic procedure it prescribes is not to be followed in all eviction proceedings that have not become final."

When petitioners filed their motion for attorneys' fees in the District Court they were attempting to commence a new action under the authority of the Fees Awards Act, an action that was simply the repetition of an action that had been finally adjudicated before the Fees Awards Act became law. This suffices to show that their petition is without merit. Moreover, the legislative history of the Act makes it quite clear that Congress had no intention of sanctioning such a plain perversion of the law.

Senator Kennedy, a principal supporter of the legislation, stated during debate: "The bill now before us, Mr. President, does not create any new legal remedies. . ." (122 Cong. Rec. S. 16252, 94th Cong. 2nd Sess. (1976, daily ed.)). In the House the following colloquy occurred between Congressman Railsback, a supporter of the bill, and Congressman Drinan, its floor manager:

> "Mr. Railsback: . . . I would simply like to point out that, as I understand it, it is clearly not the intent of Congress to create a new remedy, but that, rather, this bill would create a remedy only in the event that the courts should in the future determine that an individual may sue under the statutes.
>
> "And the bill does not authorize or statutorily grant any private right of action which does not now exist. At least I feel certain that is our intent. I think we ought to establish that in the Record."
>
> "Mr. Drinan. I concur completely. We do not create any new statutory right of action in the bill today." (122 Cong. Rec. H. 12153, 94th Cong. 2nd Sess. (1976, daily ed.)).

Petitioners have cited *Hutto* v. *Finney,* 57 L.Ed 2d 522 (1978), as supportive of their position. Such is not the case. With respect to this issue, *Hutto* applied the law laid down (or reaffirmed) in *Bradley* in a case where, precisely as in *Bradley,* the question of the propriety of an award of attorneys fees was pending resolution on appeal at the time of enactment of an attorneys fees awards act (the Fees Awards Act) that was intended to apply to Bradley-type pending cases.[1]

A very obvious misreading of the opinion of the court below has led petitioners to attribute to that court a holding that the principles enunciated in *Bradley* apply only to cases that are pending on appeal at the time a new law becomes effective (thus excluding cases

[1] For an interesting and well-reasoned decision in which it was held that the Fees Awards Act is not applicable to a case in which all substantive issues, including the attorneys fees issue, had been resolved by the effective date of the Act, see *Peacock* v. *Drew Municipal Sch. Dist.,* 433 F.Supp. 1072 (N.D. Miss., Greenville Div. 1977).

pending in trial courts or in administrative proceedings). They cite seven cases to demolish this straw man. It would serve no useful purpose to comment on them here.

In attacking what they say was the second erroneous basis for the Court of Appeals' decision, petitioners cite *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1938) and *Perkins* v. *Standard Oil Co.,* 399 U.S. 222 (1970), as presenting virtually the identical issue that is involved here, and upbraid the Court of Appeals for refusing to follow such compelling precedents. But examination of these two decisions discloses that each is readily distinguishable from the instant case and that the distinctions go to the very essence. In *Sprague* the issue of attorneys fees was not before the Court in the earlier proceeding (*Ticonic National Bank* v. *Sprague,* 303 U.S. 406 (1938)), was not considered by it, was not impliedly before it, was not waived, was not mentioned in the opinion or the mandate, and therefore the mandate did not foreclose consideration of that issue by the court below. In the words of Mr. Justice Frankfurter speaking for the Court in the second proceeding:

> ". . . While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See Re Sanford Fork & Tool Co., 160 U.S. 247, 40 L.Ed. 414, 16 S.Ct. 291; Ex parte Century Indem. Co., 305 U.S. 354, ante, 216, 59 S.Ct. 239 . . ." 307 U.S. at 168

In *Perkins* also this Court's mandate in the earlier proceeding (*Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969)) was silent on the question of attorneys fees, as was its opinion, that issue not being before the Court. Accordingly, on a subsequent review of the case, after

the court below had awarded attorneys fees, the Court noted the absence of this issue in the earlier review and the consequent lack of consideration or reference to it in its earlier mandate, and held that this "left the matter open for consideration by the District Court, to which the mandate was directed." 399 U.S. at 223. Petitioners also cite *Maddrix* v. *Dize,* 153 F.2d 274 (C.A. 4, 1946) as "a decision totally at odds with its holding herein . . ." (Petition, p. 12) Upon examination of *Maddrix* the now familiar pattern emerges. The question of attorneys fees for services performed in the appellate courts in a case brought under a statute which provided for the awarding of attorneys fees to successful plaintiffs was neither raised nor considered in the Court of Appeals or this Court in the earlier proceeding (*Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1945)). The Court's opinion and mandate affirming the judgment below were therefore silent on the subject. After remand, fees for services in the appellate courts were applied for but denied by the District Court which considered itself bound by this Court's mandate. In reversing, the Court of Appeals said:

> ". . . The allowance of an additional fee [for services in the appellate courts] does not disturb or enlarge the judgment to which the Supreme Court has given its sanction. The matter of an additional fee was not considered by that court and consequently the present application does not fall within the rule that on a mandate of affirmance from the Supreme Court the District Court has no power to rescind or modify what has been established but can only record the mandate and proceed with the execution of the decree that has been affirmed. . ." 153 F. 2d at 276.

Finally, petitioners cite *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (C.A. 2, 1967), cert. denied, 390 U.S. 956. But that decision is so uniquely different in its facts and circumstances and applicable legal principles that it has no precedential value here, and was not even mentioned in *Bradley.* It involved the invocation by the Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964) of the act of state doctrine, by virtue of which the Court declined to rule on the merits in an action involving a claim by an agency of the Castro Government of Cuba to American property which had been confiscated by Castro, and reversed the judgment below which held that the American property had been confiscated in violation of international law. The Court remanded the case for further proceedings in conformity with its opinion. As stated by the District Court to which the case was remanded:

> ". . . The mandate reversed the decision of the Court of Appeals and remanded the case to this court 'for further proceedings in conformity with the opinion of this Court.' The opinion specifically left open to this court the admission of C.A.V. as a party, which is to some extent responsible for the present posture of this case. It stated 'Although we discern no remaining litigable issues of fact in this case, the District Court may hear and decide them if they develop.' 376 U.S. at 408, 439, 84 S.Ct. at 946. Thus, the Supreme Court envisioned that there might be more than merely formal proceedings in this court before judgment could be entered." *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957, 971. (U.S.D.C.S.D.N.Y. 1965).

Subsequent to the decision of the Court and issuance of its mandate in *Sabbatino* the President signed the Foreign Assistance Act of 1964 containing an amendment known as the Hickenlooper Amendment. (Section

301(d)(4) of Public Law 88-633, 78 Stat. 1009, 1013.) The Amendment provided in effect that the act of state doctrine should not be applied by any court to prevent decision on the merits giving effect to the principles of international law in any case arising out of foreign expropriations unless the President should determine that application of the act of state doctrine is required in a particular case by the foreign policy interests of the United States, and should file a suggestion to that effect with the court. The Hickenlooper Amendment ". . . became law after the Supreme Court had remanded . . . [the] case to the trial court but before the trial court had acted upon the merits after the remand." *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 178 (C.A. 2, 1967). On this same point, the District Court stated that when the Amendment became law proceedings with respect to the entry of judgment on remand were still pending, and recited in detail the complicated and controverted proceedings that were still going on at the time. *Banco Nacional de Cuba* v. *Farr,* 243 F.Supp. 957, 961-2.

The Court of Appeals in *Banco Nacional* noted that the general mandate rule does not apply to matters left open by the mandate, citing *Sprague* v. *Ticonic National Bank, supra, Ex Parte Union Steamboat Co.,* 178 U.S. 161 (1939), and *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895), and expressed its view that "the mandate rule should not cover this novel situation . . ." 383 F.2d at 178.

There were other factors of controlling significance in *Banco Nacional* which clearly distinguish it from the instant case, e.g.: the clearly granted constitutional authority for the assertion of congressional power in the field of foreign relations; the fact that a party does

not have a substantive or vested right in the application of the act of state doctrine, so that it cannot be said that the enactment of the Hickenlooper Amendment affected Banco Nacional's property rights, or created any new rights or liabilities; the fact that the application of the act of state doctrine in favor of Banco Nacional was without regard to the merits of the Bank's claim; the fact that the effect of the application of the act of state doctrine in *Banco Nacional* was similar to that of a successfully pleaded statute of limitations by which a defendant obtains a judgment without the merits of plaintiff's action ever having been reached, and that continuing this analogy, it is well established that modification of statutes of limitation does not create or destroy constitutionally protected property rights in those affected by the changes. All of these factors are fully and ably discussed, with ample citations of authority, in the opinion in the Court of Appeals in *Banco Nacional, supra.* In sum, as to *Banco Nacional,* it is *sui generis,* totally different from the instant case, and of no precedential value to petitioners.

II

Retrospective Application of the Act in This Case Would Be Manifestly Unjust

Assuming *arguendo* that the reasons already stated for denying certiorari, which these respondents believe are so cogent, are nonetheless unavailing, *Bradley* and cases cited in *Bradley* provide further reasons, perhaps more compelling, for denying certiorari in this case. In *Bradley,* 416 U.S. at 716, the Court noted the observation in *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268 (1969), that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice," citing *Greene* v. *United States,* 376 U.S. 149 (1964), and at 717 states that "the Court in *Schooner Peggy* suggested that such injustice could result 'in mere private cases between individuals,' and implored the courts to 'struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.' 1 Cranch, at 110, 2 L.Ed. 49."

Here we have a private case between individuals which at this stage is concerned exclusively with obtaining attorneys fees for one well-known civil rights organization and for a civil rights attorney who as shown in the record below uses the office address of an even better-known civil rights organization, the American Civil Liberties Union. The action was originally instituted under an 1866 civil rights statute never before held to apply to private schools, and which contained no provision for the award of attorneys fees. There was a four-three division in the Court of Appeals on the question of whether the statute applied to private schools and a four-three division as to whether the trial court's findings of fact (including the finding of racial discrimination) were not clearly erroneous. *McCrary* v. *Runyon,* 515 F.2d 1082 (C.A. 4, 1975). There was no finding of obduracy or bad faith on the part of respondents.[2]

In *Runyon* v. *McCrary,* 427 U.S. 160 (1976) the Court divided seven to two as to whether the statute

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[2] On the contrary, in its memorandum opinion and order the District Court said:

> "Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or willfully in disregard of clear existing law." *Gonzales et al* v. *Fairfax-Brewster School, Inc.,* 363 F.Supp. 1200, 1205, n. 5 (U.S.D.C.E.D. Va. 1973).

applied. Mr. Justice Powell, a member of the majority, wrote a concurring opinion in which he indicated that he did not feel free to disregard recent precedents holding that the statute was applicable to private contractual choices, but that if the slate were clean he might well be inclined to agree with Mr. Justice White (who wrote the dissenting opinion, in which Mr. Justice Renquist joined) that the statute was not intended to restrict private contractual choices. Another member of the majority, Mr. Justice Stevens, wrote a concurring opinion in which among other things he stated that he firmly believed that the line of authority (commencing with *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)) holding the statute applicable to private racial discrimination was incorrectly decided; that that construction of the statute would have amazed the legislators who voted for it; that since the legislative history discloses an intent not to outlaw segregated public schools at that time, it was quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools; and that were the Court writing on a clean slate he would vote to reverse. However, taking into account the interest in stability and orderly development of the law, the change in the national policy as formulated by Congress regarding racial discrimination since the day of the Congress that enacted the statute, and the significant step backwards contrary to his understanding of the *mores* of today which would result if the Court should overrule *Jones*, with effects that would not have arisen from a correct decision in the first instance, he concluded that it was entirely correct for the Court to adhere to *Jones*.

Returning to *Bradley*, the Court said:

> "The second aspect of the Court's concern that injustice may arise from retrospective application of a change in law relates to the nature of the rights effected by the change. The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional. . . ." 416 U.S. at 720

The Court cited *Greene* v. *United States, supra; Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141 (1944); and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913). Although in *Bradley* no such matured or unconditional right existed to bring it within the manifest injustice exception, the contrary is true here. The Court's judgment in *Runyon* freed these respondents from all liability for petitioners' attorneys' fees. Retrospective application of the Act would snatch this freedom away and expose respondents to liability not only for petitioners' attorneys fees of $43,475.00 already claimed in the District Court but also for fees for this second journey through the Federal courts, all to be added to fees for their own counsel incurred in what to respondents has been a nightmarish experience now well into its sixth year. As stated in *Bradley*, a third concern of the Court as to injustice that may arise from retrospective application of a change in law "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." 416 U.S. at 720. Retrospective application here would be in disregard of that concern.

To apply the Fees Awards Act retrospectively in this case would victimize these two small schools unjustly, indeed cruelly.

CONCLUSION

The decision below is clearly correct. There is no conflict of decisions. No questions of general importance are involved requiring review. The Petition should, therefore, be denied.

Respectfully submitted,

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September, 1978